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SUPREME COURT OF THE

OCTOBER TERM, 1950

Consolidated Motor Transport, Inc., a Corporation, Petitioner,

vs.

Interstate Power Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

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INDEX.

PAGE

Petition for writ of certiorari 1

Opinions below 1

Jurisdiction 2

Questions presented 2

Statutes involved 3

Statement 4

Specifications of error to be urged 11

The opinions of the court below 11

Reasons for granting the writ 12

Conclusion 27

Cases Cited.

Bradley v. The American Radiator and Standard San. Corp., 6 F. R. D. 37 18

Brown v. Bernstein, 49 Fed. Sup. 728 19

Defense Supplies Corp. v. Norwalk Tire & Rubber Co., 61 F. Supp. 252, l. c. 255 23

Gaynor v. Metals Reserve Company, 166 F. (2d) 1011 13

Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, l. c. 262 18

Kiefer & Kiefer v. Reconstruction Finance Corporation et al., 306 U. S. 381 ..... 2, 12

Lawrence Warehouse v. Defense Supplies Corporation, 168 F. (2d) 199 13

Lichter v. United States, 334 U. S. 742 16

Miller v. Robertson, 266 U. S. 243 19

PAGE

Reconstruction Finance Corporation v. The J. G. Menihan Corporation, 312 U. S. 81 3
Reconstruction Finance Corporation v. Childers et al., Court of Appeals, No. 14094 14
Seven Oaks v. Federal Housing Administration, 171 F. (2d) 947 14
United States v. Chemical Foundation, 272 U. S. 1 17

Statutes Cited.

First War Powers Act, 50 U. S. C. A., Appendix 611 3
Second War Powers Act, 50 U. S. C. A., Appendix 633 3
Reconstruction Finance Corporation Act of 1932, as amended, Section 5d (15 U. S. C. A. 606b) 3
Sec. 1254 of Title 28 of the United States Code 2
Section 5d of the Reconstruction Finance Corporation Act of 1932, as amended, 15 U. S. C. A. 606(b) 4
Joint Resolution of June 30, 1945 (59 Stat. 310) 3
50 U. S. C. A., Appendix 923 3
50 U. S. C. A., Appendix 902(e) 3
50 U. S. C. A., Appendix 924(a)(d) 3
Rule 73(a), Federal Rules of Civil Procedure 26
Rule 54(d), Federal Rules of Civil Procedure 26

In the

Supreme Court of the United States

October Term, 1950.

MacArthur Mining Company, Inc., a Corporation,
Petitioner,

vs.

Reconstruction Finance Corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

No. ———.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, MacArthur Mining Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above entitled case.

Opinions Below.

The opinion of the Court of Appeals was entered November 6, 1950 (R. 492) (184 F. 2d 913).

The opinion of the District Court was entered November 22, 1949 (R. 453) and is reported in 87 F. Supp. 211.

Jurisdiction.

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 6, 1950 (R. 502). The jurisdiction of this Court is invoked under Sec. 1254 of Title 28 of the United States Code.

Questions Presented.

Question 1. Whether the opinion of the Court of Appeals in this case prejudicially ignores the controlling rule established by the case of *Kiefer & Kiefer* v. *Reconstruction Finance Corporation et al.,* 306 U. S. 381, wherein this Court held that the Reconstruction Finance Corporation may sue and be sued and that a suit against the Reconstruction Finance Corporation is not a suit against the United States to which the United States had not given its consent.

Question 2. Whether the opinion of the Court of Appeals in this case and the opinions of the Court of Appeals, District of Columbia Circuit, *Story* v. *Snyder, et al.,* 184 F. (2d) 454, and the opinion of the Court of Appeals for the First Circuit, *Atlantic Meat Company* v. *Reconstruction Finance Corporation,* 166 F. (2d) 50, are, prejudicially to petitioner, in irreconcilable conflict with the controlling rule announced in the case of *Kiefer & Kiefer* v. *Reconstruction Finance Corporation et al.,* 306 U. S. 381, with respect to the power and right of the Reconstruction Finance Corporation to sue and be sued.

Question 3. Under the War Power Acts of Congress does the President of the United States have the right and power to do that which he did in this case, namely,

issue a directive to the mining industry upon which said industry relied; and is that directive a valid contractual obligation?

Question 4. Is the Act of Congress specifically removing the acquisition and production of strategic and critical materials, in which category lead and zinc are placed, from the jurisdiction of the Price Administrator and the provisions of the Emergency Price Control Act to be given effect, or is said congressional action to be ignored as it was by the Court of Appeals in this case?

Question 5. Does the Emergency Court of Appeals have sole jurisdiction of a question involving contractual obligations of the Reconstruction Finance Corporation as was held by the Court of Appeals in this case, or is that a matter within the jurisdiction of the District Court as was held by the District Court in this case?

Question 6. Is the Reconstruction Finance Corporation an agency of the United States within the meaning of Rule 73(a) of the Federal Rules of Civil Procedure providing for time within which an appeal may be taken to the Court of Appeals from the District Court or is it in the same status as any ordinary litigant as held by this Court in *Reconstruction Finance Corporation* v. *The J. G. Menihan Corporation,* 312 U. S. 81?

Statutes Involved.

First War Powers Act, 50 U. S. C. A., Appendix 611.

Second War Powers Act, 50 U. S. C. A., Appendix 633.

Reconstruction Finance Corporation Act of 1932, as amended, Section 5d (15 U. S. C. A. 606b).

Joint Resolution of June 30, 1945 (59 Stat. 310).

50 U. S. C. A., Appendix 923.

50 U. S. C. A., Appendix 902(e).

50 U. S. C. A., Appendix 924(a)(d).

STATEMENT.

This suit is for breach of contract on the part of the Reconstruction Finance Corporation. The legality of this contract is to be found in Section 5d of the Reconstruction Finance Corporation Act of 1932, as amended, 15 U. S. C. A. 606(b), wherein Congress specifically authorized the Reconstruction Finance Corporation to create the Metals Reserve Company to deal in strategic metals for National Defense (R. 22).

Petitioner was incorporated in 1942, subsequent to and because of Pearl Harbor. At that time it became apparent to the United States Government that its reserves for copper, lead and zinc were dangerously low for the successful prosecution of a World War. The big problem was production, particularly from the so-called Tri-State District, which district comprised segments of the states of Missouri, Kansas, and Oklahoma and from which district a substantial portion of the zinc and lead output of the United States had been produced. However, the depletion of the mines of their richer ores had reduced the mines of this district in large part to a marginal character. By marginal mines is meant that the recovery of lead and zinc per ton of rock mined so nearly approximates or in most cases exceeds the cost of production that it is impracticable for a private operator to market these metals except at a loss. (Defendant's Admission, R. 22.)

In order to encourage private operators to produce these vitally needed metals, the Reconstruction Finance Corporation agreed to assist by the making of loans and the Premium Price Plan was evolved as an administrative agency for this purpose. As stated in the release of the Office of Economic Stabilization, March 28, 1946, "The Premium Price Plan is a subsidy system which has been in operation since February, 1942. Its primary purpose

was to obtain production of critically needed non-ferrous metals by compensating for abnormal costs in the production of marginal ores." The authority under which the plan functioned was established in the Reconstruction Finance Corporation Act of 1932, as amended, which provided among other things that Reconstruction Finance Corporation might create corporations to deal in strategic and critical materials or to take such other action as the President and the Federal Loan Administrator might deem necessary to expedite the national defense program. Metals Reserve Company (a wholly owned subsidiary of the Reconstruction Finance Corporation) was such a corporation and it was with funds provided to Metals Reserve Company by Congress that the plan was financed (the Metals Reserve Company was dissolved and all of its assets and liabilities were transferred to and assumed by Reconstruction Finance Corporation by act of Congress in 1946. U. S. C. A. 601 note.) (Defendant's Admission, R. 22.)

In accordance with the aforesaid policy, the Reconstruction Finance Corporation agreed and did loan to your petitioner the sum of $125,000.00 for the purpose of developing an ore body in the Tri-State District. (In order to show the good faith of petitioner in this case it is a matter of record that the entire sum loaned by the Reconstruction Finance Corporation has been repaid although, in order to make such repayment, approximately 59,567 tons of ore-producing rock were devoted to this purpose by petitioner which were not covered by the Reconstruction Finance Corporation mortgage) (R. 90, 98, 99). However, due to the increasing costs of labor, the inefficiency of manpower due to the military requirements and the expense of continually pumping thousands of gallons of water per minute in order to make production possible, it became apparent, in the spring of 1943,

to petitioner that further operation with the subsidies as granted to petitioner under the Premium Price Plan would be impossible (R. 94, 95). (The inadequacy of these subsidies had been a matter of continual protest on the part of your petitioner.) (R. 110, 118.) Said protests are admitted. Before making a definite decision on this point, however, the president of your petitioner made a trip to Washington and conferred with representatives of the Reconstruction Finance Corporation and it was at this time that the Presidential Directive (Exhibits A and B attached to and made a part of the petition) (R. 13, 65) was called to his attention, and he was informed by an officer of the Reconstruction Finance Corporation that, in view of said Directive, he should continue his operation and he definitely would receive a fair margin of profit (R. 95). The Premium Price Plan of which the Metals Reserve Company was the governing body and the fiscal agency was the agency empowered and required to carry out this Directive (R. 121) (122). As the Honorable Harold Judson, Assistant Solicitor General of the United States, states: "The Presidential Directive was an authoritative statement of the policy of the Executive to be applied by the Executive Agencies of the Government to the full extent of their legal powers." (See Exhibit D attached to and made a part of the petition) (R. 19). Metals Reserve Corporation failed entirely to carry out, in fact or in spirit, this Directive, although it had the legal power and congressional mandate to do so by Act of Congress in its very creation.

In reliance on said Directive, petitioner continued its operation and during the years 1943 and 1944 (the period herein complained of) produced 223,131 tons of ore-producing rock for the war effort. However, despite continuous protests, orally and in writing, by petitioner as to the inadequacy of the subsidies allowed by the admin-

istrative agency of the Premium Price Plan in the light of the Presidential Directive, petitioner was caused to suffer a net loss of 19c per ton of rock mined (R. 111), although the uncontroverted evidence at the trial showed that petitioner was entitled to a fair margin of profit of $1.25 per rock ton and the trial court so held.

It is the position of petitioner that the Presidential Directive constituted a commitment to petitioner that subsidies would be established which would result in a fair margin of profit and that said Directive constituted a binding contract between petitioner and Reconstruction Finance Corporation through its subsidiary Metals Reserve Company. Petitioner states that it has fully performed its part of said contract by the production of large quantities of the vitally needed lead and zinc, but that Reconstruction Finance Corporation has refused and continues to refuse to make adequate payment for same as is its legal duty so to do.

The point is this: The Act of Congress amending the Reconstruction Finance Corporation Act of 1932 and creating Metals Reserve Company required Metals Reserve Company to take such action with relation to strategic and critical materials as the President might deem necessary. Despite this congressional mandate, the facts indisputably show that Metals Reserve Company chose to ignore the Presidential Directive, although legally bound to comply with its provisions, and that, as a result, petitioner suffered a loss of $296,681.77 for which judgment was entered (R. 454).

As stated in the Report of the Senate Subcommittee, Print No. 8, page 81, in the Report of the Subcommittee on Mining and Minerals Industry to the Special Committee to Study and Survey Problems of American Small Business, dated February 1, 1946:

> "The authority under which the plan functions was established in the Reconstruction Finance Corporation Act of 1932, as amended, which provided among other things that there might be created corporations to deal in strategic and critical materials or to take such other action as the President and the Federal Loan Administrator might deem necessary to expedite the national defense program. Metals Reserve Company is such a corporation and it is with funds provided to MRC by Congress that the plan is financed."

The opinion of the Honorable John C. Collet, then Acting Stabilization Administrator (Exhibit C attached to the petition, R. 14), wherein he reviewed and approved the position of your petitioner, held that the Presidential Directive constituted a "commitment" to your petitioner that quotas and premiums would be established which would result in a fair margin of profit.

Concisely: the President of the United States, through and by virtue of his War Act Powers, granted unto him by Congress for the effective prosecution of the war, stated to petitioner: If you will produce the critically needed lead and zinc required for the successful prosecution of this war, Metals Reserve Corporation (whose assets and liabilities were by Congress transferred to Reconstruction Finance Corporation (R. 22)), will pay you a fair margin of profit. This, Metals Reserve did not do.

The Reconstruction Finance Corporation does not challenge the fact that the MacArthur Mining Company substantially produced the vitally needed lead and zinc; nor does it challenge the fact that MacArthur Mining Company not only did not receive a fair margin of profit but in fact lost 19c per rock ton mined (R. 111); its only defense is concisely summed up by the District Court in

its opinion on Reconstruction Finance Corporation's challenge as to the jurisdiction of the Court (82 F. Supp. 455, l. c. 458) wherein Judge Reeves stated:

> "It should be kept in mind that, if the averments of the plaintiff are true, it sustained heavy losses in its efforts to provide the government with strategic and critical materials in a time of war. In doing so, it had been assured of subsidies to protect it against losses and to afford a fair margin of profit. In its effort to recover its claimed losses it is challenged by counsel for the government as having failed to bring itself within such provision of law that would enable it to secure an adjudication on the merits of its claim. The plaintiff is confronted with a wilderness of ukases, directives and regulations, many of which are designed to defeat recovery and to accomplish forfeitures. As nature abhors a vacuum, so does the law abhor a forfeiture. Not only should a benign and benevolent sovereign hold itself always in readiness to meet fairly and honestly its obligations and the just claims of its subjects but the judges should be alert to protect a litigant against defeat of a claim if meritorious and just.
>
> The foregoing should be a postulate to the consideration of every case where, as here, the government is involved and the rights of the claimant are hedged about with confusing regulations."

The position of petitioner is unique in comparison with other producers in that it continually protested against the quotas assigned to it. In addition it was advised (R. 16) on December 30, 1943, by Director of the Metal Mining Analysis that it would be well to wait until the cost and revenue situation was stabilized at full production before considering an operation report submitted in connection with claims for more favorable quotas and additional premiums.

In other words, a decision in this case favorable to your petitioner does not involve reopening quotas definitely closed by acceptance and lack of protest on the part of other producers. This is made clear by the opinion of the Honorable John C. Collet (R. 18) wherein he held that in view of the continued protests by your petitioner as to the inadequacy of the quotas established and premiums paid and the further fact that your petitioner was advised by the Director of the Metal Mining Analysis to wait until the cost and revenue situation was stabilized at full production before considering an operating report submitted in connection with claims for more favorable quotas and additional premiums, a review of the quotas established and premiums paid should be done and could be done without committing the government to a policy of reopening quotas definitely closed.

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals for the Eighth Circuit erred:

1. In holding that this action is one against the United States to which the government has not consented to be sued.

2. In holding that the Directive of the President of the United States, issued under his congressionally authorized War Powers, did not constitute a contract between petitioner and the Reconstruction Finance Corporation.

3. In holding that the Emergency Court of Appeals had exclusive jurisdiction.

The Opinions of the Court Below.

The opinion, findings of fact and judgment of the District Court awarding to your petitioner the sum of $296,681.77 representing damages for breach of contract on the part of the Reconstruction Finance Corporation appear in the record filed herein (R. 450-455).

The opinion and judgment of the Court of Appeals also appears in the record (R. 492) (502).

Because of the importance of the case, not only to your petitioner but to the public, an extended motion for rehearing consisting of 29 pages was filed on November 29, 1950, copies of which were mailed by the Clerk of the Court to the Judges who heard the case, none of whom were then in St. Louis, Missouri. The petition for rehearing was overruled on December 5, 1950.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals in holding that this cause is a suit against the United States to which action the United States had not given its consent is in irreconcilable conflict with the leading case of *Kiefer & Kiefer* v. *Reconstruction Finance Corporation, et al.*, 306 U. S. 381.

The Court as a basis for its opinion cited the cases of *Ex parte New York,* 266 U. S. 490, 500, and the case of *Land* v. *Dollar,* 330 U. S. 731.

The clear, legal and apparent distinction between cases such as the New York case and the Land case and cases involving governmental corporations endowed by Congress with the right to sue and be sued is concisely stated in the recent case of *Story* v. *Snyder, et al.,* 184 F. (2d) 454, decided by the United States Court of Appeals, District of Columbia Circuit.

In that case, the Court had before it the question of whether the "Library of Congress Trust Fund Board is subject to suit in the District Court for the District of Columbia, on a cause of action alleged to have risen in connection with the administration of the Board's duties."

The Court found that, under the statute which controlled the Trust Fund, the suit was one against the United States, and cited the *Land* v. *Dollar* and the *Ex parte* New York cases in support.

However, in distinguishing the Trust Fund case and the Land and New York cases from cases involving corporations such as Reconstruction Finance Corporation endowed by Congress with the power to "sue and be sued," the Court stated:

> "Where Congress has authorized the formation of a business corporation, to be owned and operated by the Government, and has empowered it to 'sue and be

sued,' consent to maintenance and defense of suit has been found. See *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784. The reasoning of such cases is, of course, readily distinguishable from the present situation. Here there is no general 'sue and be sued' clause, but instead, a limited grant of jurisdiction. Nor was the defendant Board ever 'launched * * * into the commercial world' within the meaning of the cases under reference. See *Federal Housing Administration, Region No. 4,* v. *Burr,* 309 U. S. 242, 245, 60 S. Ct. 488, 490, 84 L. Ed. 724. And whether or not sovereign immunity should be applied, as a matter of policy, is no longer an open question. While the rule has been the subject of considerable criticism (*R. F. C.* v. *J. G. Menihan Corp.,* 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595; *Kenecott Copper Corp.* v. *State Tax Commission,* 327 U. S. 573, 580, 581, 66 S. Ct. 745, 90 L. Ed. 862 (Frankfurter, J., dissenting); *Keifer & Keifer* v. *R. F. C., supra,* 306 U. S. at pages 390-391, 59 S. Ct. at pages 518-519), it is too firmly entrenched in our system of law to be discarded by judicial fiat. It has been an assumed premise upon which much legislation has been predicated."

In the case of *Lawrence Warehouse* v. *Defense Supplies Corporation,* 168 F. (2d) 199 (a corporation similar to Metals Reserve Company) the Court said, l. c. 205:

> "However, we do not agree that the United States is the real party litigant when the Reconstruction Finance Corporation is sued or being sued."

As stated by Judge Gardner in the case of *Gaynor* v. *Metals Reserve Company,* 166 F. (2d) 1011, in speaking of the Act of Congress whereby Reconstruction Finance Corporation assumed all the liabilities of Metals Reserve

Company whether arising out of contract or otherwise, l. c. 1014:

> "It was not the intention of Congress to repudiate any just debt or liability theretofore incurred."

In the case of *Seven Oaks* v. *Federal Housing Administration,* 171 F. (2d) 947, the Court, in construing the "sue and be sued" clause, stated:

> "* * * The will of Congress that the Housing Administration be subject to suit in the same way as other federal corporations dealing with the public seems sufficiently clear * * *."

In support of its opinion on this point the Court of Appeals also cites the case of *Atlantic Meat Company* v. *Reconstruction Finance Corporation,* 1 Cir., 166 F. (2d) 50-56. This decision is likewise in irreconcilable conflict with the Keifer case and your petitioner has no doubt but what had that case been presented to this Court by petition for certiorari the Court of Appeals for the First Circuit would have been overruled on this point. However, the decision of the First Circuit was never presented to this Court for consideration and as a consequence the Court of Appeals in this case has been led into error.

It is particularly difficult to understand the Court of Appeals' for the Eighth Circuit opinion on this point when, in a recent opinion dated December 15, 1950, it *upheld* the doctrine of the Keifer case and in effect overruled its opinion in the case at bar.

This recent opinion was a *per curiam* decision rendered on a motion for rehearing in the case of *Reconstruction Finance Corporation* v. *Childers et al.,* Court of Appeals, No. 14094—not yet officially reported. In that opinion, the court stated in response to the Recon-

struction Finance Corporation's contention that, as a public corporation, it was not responsible for the mistakes of its agents:

> "In substance this is a challenge to the jurisdiction of the court predicated upon immunity of the government and its agencies. Such immunity was waived in the Act of Congress creating the Reconstruction Finance Corporation, which provides: "It (R. F. C.) shall have power * * * to make contracts; * * * to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; * * *" 15 U. S. C. 603, 1946 Supp., 15 U. S. C. A. 603 (a).
>
> The statute does not state expressly that a party against whom the Reconstruction Finance Corporation brings suit may appear and defend; but such right is implied. To hold otherwise would violate the due process clause of the 14th Amendment; for it would sanction the breaking of a contract by the Reconstruction Finance Corporation with a citizen and the taking of his property by aid of the court without a hearing. And since he may defend, the rules governing the trial and decision are the same as they would be in a case where both parties are private citizens. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381; *F. H. A.* v. *Burr*, 309 U. S. 242; *R. F. C.* v. *Menihan Corp., et al.*, 312 U. S. 81.
>
> The motion for rehearing will accordingly be dismissed."

Consequently, in view of the conflict between the opinions of the Courts of Appeal for the First Circuit and the Eighth Circuit and the conflict in the Eighth Circuit itself, with the doctrine as announced in the Keifer case and the additional conflict between the Circuits as evidenced by the decision in the District of Columbia Circuit (*Story* v. *Snyder et al.*, 184 F. (2d) 454), it is of the utmost public interest that this Court

by granting this petition for certiorari reannounce once and for all, to the Courts and to the people, that the doctrine of the Kiefer case is still the law of the land and that governmental corporations endowed by Congress with the right to sue and be sued may be sued in any Court of competent jurisdiction and that the defense that such an action is in effect one against the United States, to which the United States has not given its consent, is spurious and of no legal effect.

2. This is a suit on contract—a contract not only possessing all of the legal attributes required of a contract but also one affected with the deepest public interest. The issue is: Did the President of the United States under Congressional War Power Acts have the right to make a binding and legal offer to an industry for the production of critical metals?

In the case of *Lichter* v. *United States,* 334 U. S. 742, the Court, in reviewing some of the administrative efforts to speed production in World War II, said:

> "The above mentioned excerpts describe a demand for production of war supplies in proportions previously unimagined. They call for production in a volume never before approximated and at an undreamed of speed. The results amply demonstrated the infinite value of that production in winning the war. It proved to be a *sine qua non* condition of the survival of the nation."

As stated in the message of the President to the Congress upon the State of the Union, January 6, 1942:

> "• • • Production for war is based on metals and raw materials—steel, copper, rubber, aluminum, zinc, tin. • • •"

Your petitioner believed that the President did have that authority and accepted the offer by the production of vitally needed lead and zinc (R. 96) (R. 65).

The Honorable Harold Judson, Assistant Solicitor General of the United States, believed that the President had that authority when he stated that the Presidential Directive was binding on all administrative agencies of the government (R. 19).

The Honorable John Caskie Collet, when acting as Stabilization Administrator, believed that the President had that authority when he termed the Presidential Directive a commitment to your petitioner (R. 14).

The *only* denial of the contractual validity of this Directive is by counsel for Reconstruction Finance Corporation and this in spite of the fact that the R. F. C.'s subsidiary, Metals Reserve Company, whose only reason for Congressional corporate existence was to deal in the production and acquisition of critical and strategic metals affirmatively recognized, by the payment of Congressionally authorized millions of dollars, the right, obligation and duty of the President of the United States to issue the Directive which your petitioner states constitutes a valid offer to it which was consummated into a valid contract by full performance.

As has been said by this Court, in the case of *United States* v. *Chemical Foundation,* 272 U. S. 1, in speaking of an executive order of the President under the Trading With the Enemy Act of 1917:

> "Obviously, all the functions of his great office cannot be exercised by the President in person."

At the time the President issued his Directive he knew that Congress had already created the Metals Reserve Company and he knew that the very act which created

the Metals Reserve Company required it to deal in the production and acquisition of critical and strategic metals in such manner as he, the President, might direct. This "chain of title" is recognized by the Assistant Solicitor General when he stated that the Directive was binding on all administrative agencies of the government.

The Court of Appeals, however, dismisses this Directive as a mere statement of policy.

If that decision is to stand, then it is fair to state that all executive orders which controlled and which were judicially enforced governing the economy and lives of our people were mere statements of policy and could not therefore have been legally enforced.

That, of course, is an absurdity, for the war powers of Congress are practically unlimited. As stated in *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253, l. c. 262:

> "* * * the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on."

Your petitioner asserts that the Presidential Directive herein involved had the force and effect of law and as such it was the lawful and legal duty of the Metals Reserve Company to pay to your petitioner "a fair margin of profit" guaranteed by that Directive. This, Metals Reserve Company did not do and the record does not challenge this fact. The legal import of an executive order issued under the War Powers Acts is stated in the case of *Bradley* v. *The American Radiator and Standard San. Corp.*, 6 F. R. D. 37:

> "On December 18, 1941, Congress enacted the First War Powers Act, 50 U. S. C. A., App. 611, 55 Stat. 839, empowering the President to authorize any

> department, or agency, of the government exercising funds in connection with the prosecution of the war effort to enter into contracts whenever he deemed such occasion would facilitate the prosecution of the war. Pursuant to this authorization and by Executive Order 9001, 6 F. Reg. 6787, the President authorized the War Department to enter into contracts in connection with the prosecution of the war. • • • Executive Order 9001 promulgated by the President pursuant to the authority delegated to him by Congress *has the effect of a statute and is 'part of the law of the land.' Givens* v. *Zerbst,* 255 U. S. 11, at page 18, 41 S. Ct. 227, 228, 65 l. ed. 475; *Armstrong* v. *United States,* 80 U. S. 154, 20 l. ed. 614." (Emphasis ours.)

So, also, the Directive of the President in the instant case became the law of the land upon which your petitioner had a right to rely.

The Court of Appeals in passing upon the instant case has completely failed to construe the contract in the light of world conditions as they were at the time the contract was entered into. It has sought out and applied peacetime standards. We assert that such a construction is morally and legally wrong. In *Brown* v. *Bernstein,* 49 Fed. Sup. 728:

> "Executive orders and legislation during a national emergency and in time of war must be expressed in broad terms and generalities, and in the interpretation of such legislation the Court must not hunt for limitations nor scrutinize the wording with confining intent, but should seek for the purpose and the spirit of the enactment."

In *Miller* v. *Robertson,* 266 U. S. 243, the Court in speaking of a contract, the subject of a suit under the Trading With the Enemy Act of 1917, stated:

> "The intention of the parties is to be gathered * * * from the whole instrument read in the light of the circumstances existing at the time of negotiations leading up to its execution."

Reconstruction Finance Corporation does not question the power and right of the President to adopt and make public the minerals program submitted to him by Donald Nelson under the broad war powers given to the President by the Congress (Rec. 28). This program was prepared on order of the President by the War Production Board, members of Congress, interested agencies and representatives of the Mining Industry. Reconstruction Finance Corporation does not question the constitutionality of the grant of war powers in the First and Second War Powers Acts. The President had the power to do what he did. He made an offer to the mining industry amounting to a wartime appeal for essential production, which offer he made public. It was accepted by your petitioner and acted upon by your petitioner. There was recognition both in Washington and in the field by the Reconstruction Finance Corporation of the operation of petitioner and there was acceptance and part payment on the contract by the Metals Reserve Company through the Premium Price Plan for such operation. This petition seeks to recover what the Metals Reserve Company failed to do under the contract, and that was to give petitioner a "fair margin of profit" as the President's Directive ordered to be done. In other words, Metals Reserve Company did not carry out the law of the land.

As part and parcel of the construction of a contract, a cardinal principle is the intention of the parties. It was the intention and design of President Roosevelt, authorized by the Congress, to induce intensive production, especially by the operation of marginal mines. It

was the intention of the MacArthur Mining Company to accept the provisions of the contract offered by the Nelson program, which program was publicly adopted by President Roosevelt. The consideration on the one side was "a fair margin of profit" and on the other the expenditure of work and labor to the end of full production.

The Congress authorized the President of the United States to make the offer of contract which he made, which contract was accepted by the fullest performance upon the part of the petitioner.

3. The opinion of the Court of Appeals in holding that the Emergency Court of Appeals has exclusive jurisdiction of the subject matter of this action is erroneous in that its conclusion is based on a wrong premise. The opinion, following the erroneous theory of counsel for the Reconstruction Finance Corporation, has *assumed* that we are here assailing regulations and orders issued under the Emergency Price Control Act. *That is not a fact.*

The Premium Price Plan did not function under the Emergency Price Control Act. As we have heretofore pointed out in our statement, page 5 of this petition, the authority for the plan was established in the Reconstruction Finance Corporation Act of 1932 as amended. That this is true is so specifically and definitely recognized and provided by Congress in Section 2(e) of the Emergency Price Control Act that there should be no fair question about it. That Act provides:

> "That in the case of any commodity which has heretofore or may hereafter be defined as strategic or critical material by the President of the United States pursuant to Section 5d of the Reconstruction Finance Act, as amended, such *determination shall be made by the Federal Loan Administrator, with*

*the approval of the President, and notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold or stored, and such subsidy payments * * * may be paid, only by corporations created or organized pursuant to such Section 5d * * *."*

The theory of opposing counsel is that inasmuch as the above exception with regard to metals *happens* to appear in the Price Control Act that therefore actions taken by Metals Reserve Company under Section 5d of the Reconstruction Finance Corporation Act necessarily were taken under the Emergency Price Control Act. This theory, of course, which was followed by the Court of Appeals, overrules the Act of Congress specifically providing for an exception in matters involving strategic and critical metals. In fact, the opinion of the Court of Appeals does not even mention the exception provided in Section 2(e) of the Emergency Price Control Act.

Under Section 204(a) of the Price Control Act a protest to the Price Administrator was made a prerequisite to the filing of a complaint with the Emergency Court of Appeals. In fact, this is apparent from the rules of that Court that the Court itself had determined it's own jurisdiction to be limited to matters involving the Price Administrator, and he alone. In the case at bar the metals program, having been removed from the jurisdiction of the Price Administrator, no appeals machinery whatever had been provided.

That none existed is shown by the Report of the Senate Subcommittee on Mining and Minerals under date of February 1, 1946. (Senate Subcommittee, Print No. 8.) We quote from the report, page 32:

"No appeals machinery, enabling producers to obtain independent reviews of and redress from de-

cisions of the Quota Committee, was established within the administrative framework of the Premium Price Plan. However, inasmuch as the Quota Committee applied unannounced rules and policies and as eligible producers seldom have been informed of the complete details surrounding denials or inadequate quota assignments, an appeals board probably would have been largely ineffective."

The Administrator of Price Control prescribed and duly published certain procedural regulations, but such regulations, as well as the authority and control of the Price Administrator, were without effect, meaning or binding or even permissive or colorable control over the production of lead and zinc ores and concentrates for the reason that strategic metals were not subject to his jurisdiction.

The Administrator of Price Control had no statutory authority whatever in the matter, either in making any order, in receiveng any protest or in ruling upon any protest involving lead and zinc ores and concentrates.

This principle is well stated in the case of *Defense Supplies Corp.* v. *Norwalk Tire & Rubber Co.*, 61 F. Supp. 252, l. c. 255:

"The Reconstruction Finance Corporation was created a body corporate on January 22, 1932, 15 U. S. C. A., Sec. 601. Its entire capital stock is owned by the United States. It was authorized by Section 606b(3), in order to enable the government in its national defense program, to create a corporation to acquire, carry, sell or otherwise deal in strategic or otherwise critical materials as defined by the President; and the powers of any corporation were to be set out in a charter, filed with the Secretary of the Senate and the Clerk of the House of Representatives. Admittedly plaintiff was so cre-

> ated and exists, and all of its capital stock is owned by the Reconstruction Finance Corporation.
>
> "The Office of Price Administrator is also a government agency, created originally under the name of Office of Price Administrator and Civilian Supply by executive order of the President, and later under the Emergency Price Control Act of 1942, 50 U. S. C. A. Appendix, Sec. 901 *et seq.* As such, it was authorized to utilize the services and facilities of other federal departments and agencies to the fullest extent compatible with efficiency. But neither under the executive order nor under the Emergency Price Control Act was it constituted an agent of the plaintiff. It was authorized to advise and make recommendations in respect to the purchase and acquisition of commodities, to formulate programs for the use of consumers' goods, fix maximum prices, and buy and sell commodities under certain conditions. But the Federal Loan Administrator was the one who should define what was a strategic or critical material, and such commodity could be bought and sold, stored or used, and payments made therefor, only by corporations organized and created under the Reconstruction Finance Corporation Act, subject only to the fixing by the O. P. A. of maximum prices."

The reason is found in the terms of Section 2(e) of the Price Control Act which expressly took from the control of the Administrator of Price Control and from the Price Control Act, all jurisdiction and authority over metals found by the President to be critical and strategic. As stated by the District Court in its opinion overruling the motion of the Reconstruction Finance Corporation to dismiss (R. 40):

> "It will be seen, therefore, that the subject matter of this action was completely taken out of the Emergency Price Control Act and transplanted in the exclusive sphere of the defendant's activities and

> under the law 'subsidy payments to domestic producers,' could be paid 'only by corporations created or organized pursuant to such section 5d,' etc. (section 609j of Title 15 U. S. C. A.)."

If the Administrator of Price Control had no authority, a protest to him would have been an utter vacuity, clearly not within congressional intent or any rule of law.

There is no provision for a protest to any other officer or agency.

Opposing counsel confuses the differences between metals and meats. By reason of statutory provisions and President Roosevelt's Directive of April 24, 1943, an entirely different course of treatment and consideration was made in the administration as to the critical metals program and other commodities program. Reconstruction Finance Corporation persists in citing meat cases and a coffee case, palpably and, in most cases, admittedly upon regulations issued pursuant to Section 2(e) of the Emergency Price Control Act and subject to protest under Section 203(a) of the Act and to review by the Emergency Court of Appeals, all of which have nothing to do with the present situation which concerns a contract respecting the production of critical metals alone and which was not subject to protest under any procedural regulation or to review by the Emergency Court of Appeals.

4. With respect to your Petitioner's position before the Court of Appeals that the appeal of the Reconstruction Finance Corporation from the District Court was not timely taken we shall limit our remarks to a brief summary in view of the fact that the Motion to Dismiss the appeal of the Reconstruction Finance Corporation

together with points and authorities will be forwarded to this Court as part of the record.

The facts are: Judgment was rendered in this cause in favor of Petitioner and against Reconstruction Finance Corporation in the sum of $296,681.77 on November 22, 1949. No motion for a new trial was filed by Reconstruction Finance Corporation, nor were there any proceedings had relative to appeal until 58 days following the rendition of the judgment at which time, to-wit, January 18, 1950, Reconstruction Finance Corporation filed Notice of Appeal. On January 20, 1950, Reconstruction Finance Corporation requested and obtained an order staying execution.

Your Petitioner submits that in view of the above facts the appeal of Reconstruction Finance Corporation from the District Court should have been dismissed by the Court of Appeals and in support thereof states:

a. Rule 73(a) of the Federal Rules of Civil Procedure governing the time for the filing of Notice of Appeal is mandatory and jurisdictional.

b. Rule 54(d) of these same Rules containing substantially the exact language of Rule 73(a) with respect to "the United States, its officers and agencies" has been construed by the Supreme Court in the case of *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U. S. 81, as being not applicable to the Reconstruction Finance Corporation.

c. Rule 73(a) was promulgated subsequent to the decision of the Supreme Court construing the language in Rule 54(d) (*Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U. S. 81).

d. In promulgating Rule 73(a) the Supreme Court certainly took cognizance of its own construction of the language used in Rule 54(d).

e. Since the Supreme Court has construed the phraseology "the United States, its officers and agencies" in Rule 54(d) as not applicable to the Reconstruction Finance Corporation, it therefore inescapably follows that the same phraseology used in Rule 73(a) is also not applicable to the Reconstruction Finance Corporation.

f. That Reconstruction Finance Corporation stands in exactly the same position as any ordinary litigant with respect to conformance with the provisions of Rule 73(a) requiring Notice of Appeal to be filed within 30 days after the rendition of judgment.

g. That the exception in Rule 73(a) providing for Notice of Appeal within 60 days from the rendition of judgment in any case in which the United States, or an officer or agency thereof, is a party is not applicable in the case of Reconstruction Finance Corporation.

h. That no Notice of Appeal having been filed by Reconstruction Finance Corporation, within 30 days from the date of the entry of judgment in this cause, the Notice of Appeal filed by Reconstruction Finance Corporation on January 18, 1950, is null and void and of no force and effect, timely Notice of Appeal being mandatory and jurisdictional.

i. That no valid Notice of Appeal having been filed, said appeal of Reconstruction Finance Corporation should have been dismissed.

Conclusion.

This petition for certiorari is probably unique in that it presents to the Court six grounds for certiorari, any one of which is sufficient to warrant this Court taking jurisdiction because of their general importance to the public and to the bench and bar. Five of the points

pertain to jurisdiction. The sixth pertains to the War Time Powers of the President and their exercise as granted by Congressional action. Such War Powers are again strikingly before the Nation as we gird ourselves for what may prove to be a Third World War.

It is therefore, of the utmost public interest that the power of the President under Congressionally granted War Powers be defined by this Court.

It is your Petitioner's position that President Roosevelt's Directive with respect to the metals industry had the force and effect of law and, your Petitioner having accepted the offer by performance, is entitled to the fair margin of profit guaranteed by the contract.

Prayer.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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CHARLES ELMORE CR

No. 481.

In the

Supreme Court of the United States

October Term, 1950.

MACARTHUR MINING COMPANY, INC., a Corporation,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION, *Respondent.*

REPLY BRIEF OF PETITIONER.

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INDEX.

PAGE

Reply brief of petitioner 1

Cases Cited.

Keifer & Keifer v. Reconstruction Finance Corporation, et al., 306 U. S. 381 2

Magnum Import Company v. De Spoturno Coty, 262 U. S. 159, 67 L. Ed. 922 1

Reconstruction Finance Corporation v. Childress, 14,094, December 12, 1950 3

Story v. Snyder, et al., 184 F. (2d) 454 2

Statute.

82 Fed. Supp. 455 5

In the

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October Term, 1950.

MacArthur Mining Company, Inc., a Corporation,
Petitioner,

vs.

Reconstruction Finance Corporation, *Respondent.*

No. 481.

REPLY BRIEF OF PETITIONER.

This Court, speaking through Chief Justice Taft, in *Magnum Import Company* v. *De Spoturno Coty,* 262 U. S. 159, 67 L. Ed. 922, stated that a writ of certiorari has two purposes:

(a) To secure uniformity of decisions between the Courts of Appeals, and

(b) To bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort.

Our Petition presents both of these points. First, as set out in the Petition (pages 12-16) there is very definitely a conflict among, not only the opinions of the Court of Appeals for the First Circuit, Eighth Circuit and the District of Columbia Circuit, but between the

opinions of the Eighth Circuit itself on the question of the legal capacity of Respondent to "sue and be sued" and all this despite the holding in *Keifer & Keifer* v. *Reconstruction Finance Corporation, et al.*, 306 U. S. 381.

As to the second point, certainly, the legal efficacy of a Presidential Directive given under Congressionally granted War Powers at a time when the country was in the midst of a global war presents a question of the highest public importance which should be decided by this Court, in the public interest, not only for the purpose of this case, but as a guide in the present national emergency, and for the future.

As to our contention of conflict between the circuits with the Keifer case and among the circuits themselves, we call the Court's attention to the fact that respondent herein failed even to mention, let alone discuss, the case of *Story* v. *Snyder, et al.*, 184 F. (2d) 454 (Petition, p. 12), decided by the United States Court of Appeals, District of Columbia Circuit, which is one of the principal cases upon which Petition is based as showing a conflict among the circuits.

This omission is further unusual in that the crystal clear opinion in the Story case clearly distinguishes cases involving governmental corporations with Congressionally granted power to "sue and be sued" from those involving the United States as such. The opinion was written by Judge George Washington, a former member of the staff of the Solicitor General at the time the Assistant Solicitor General, Mr. Judson, wrote the official opinion involved in this case to the effect that the Directive of President Roosevelt was binding on all administrative agencies (Rec. 19). Judge Washington's opinion is squarely in conflict with the decision of Judge Thomas in the case at bar.

Our further important contention that *Reconstruction Finance Corporation* v. *Childress,* 14,094, December 12, 1950 (Pet. 14-15), decided by the Court of Appeals, Eighth Circuit, reveals a conflict in the Eighth Circuit itself, is disposed of by Respondent with a footnote (Respondent's Brief, p. 32) wherein Respondent apparently considers there is no conflict for the reason that the Childress case was *by* the Reconstruction Finance Corporation and the instant case *against* the Reconstruction Finance Corporation. Respondent would determine the existence or nonexistence of conflicting legal theories by the position of the parties at the bar as to their being plaintiff or defendant and Respondent makes this indefensible contention in the face of the Childress opinion itself which states (Petition, p. 15):

> "In substance this is a challenge to the jurisdiction of the court predicated upon immunity of the government and its agencies. Such immunity was waived in the Act of Congress creating the Reconstruction Finance Corporation, which provides: 'It (R.F.C.) shall have power * * * to make contracts; * * * to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; * * *' 15 U. S. C. 603, 1446 Supp., 15 U. S. C. A. 603.
>
> (a) The statute does not state expressly that a party against whom the Reconstruction Finance Corporation brings suit may appear and defend, but such right is implied. To hold otherwise would violate the due process clause of the 14th Amendment, for it would sanction the breaking of a contract by the Reconstruction Finance Corporation with a citizen and the taking of his property by aid of the court without a hearing. And since he may defend, the rules governing the trial and decision are the same as they would be in a case where both parties are private citizens. *Kiefer & Kiefer* v. *R. F. C.,*

306 U. S. 381; *F. H. A.* v. *Burr,* 309 U. S. 242; *R. F. C.* v. *Menihan Corp., et al.,* 312 U. S. 81. The motion for rehearing will accordingly be dismissed."

With respect to the legal efficacy of the Presidential Directive, in respect to the contract here involved, Respondent disposes of that all-important point of public interest in one paragraph (Respondent's Brief, p. 29), citing cases not in point since they definitely did not involve *Congressionally authorized* wartime directives of the President of the United States. In other words, the Directive in this case rose above the policy level and became, as Judge Collet held (R. 17), "a commitment" to your Petitioner and as Mr. Harold Judson, Assistant Solicitor General, stated (R. 19). "an authoritative statement of the executive, to be applied by the executive agencies of the government to the full extent of their legal powers."

The mainly relied upon defense of Respondent to this action is the same now as it was in its first pleading filed in the District Court, namely, that exclusive jurisdiction of this cause is vested in the Emergency Court of Appeals. Eight and one-half pages of its argument is devoted to this point—the two really important points regarding the petition being disposed of in three and one-half pages.

It is difficult to understand Respondent's constant hammering on this point (unless it be that it feels it must win on this point or lose all) when it *knows* that a protest to the Price Administrator was a condition precedent to the right to invoke the jurisdiction of that court (Sections 203, 204 of the Emergency Price Control Act) and when in its brief filed herein (p. 31) it states that in addition to the MRC, the OPA, WPB and others were in-

volved in the Premium Price Plan. In other words, Respondent must know that a protest to the OPA because of an inadequate premium would have been a nullity. This is established by their principal witness, Mr. Hayes, who was at one time chairman of the Quota Committee and later one of the three reviewing officers of that committee wherein he stated at the trial of this cause (R. 290) that there was no method of protest or appellate remedy from an order of the Quota Committee under the Premium Price Plan.

Despite these other administrative agencies being involved in the administration of the Premium Price Plan, it is undisputed that at all times the Metals Reserve Company remained the only *Congressionally* authorized corporation whose purpose it was to deal in the acquisition of critical metals, and thus the only legal entity capable of and charged with the duty of fully carrying out the Presidential Directive. This fact the President must have known when he issued the Directive.

Respondent in its brief (p. 25) cites a number of meat cases to support its position. Not one metals case is cited for the obvious reason that there could not be any under the operation of the Premium Price Plan. The OPA, on the other hand, had sole control over meat subsidies and thus there was a way to lodge a protest which would permit invoking the jurisdiction of the Emergency Court of Appeals.

Respondent's position that the Emergency Court of Appeals had exclusive jurisdiction of this metal case is untenable. Members of this Court are earnestly referred to the two studious and exhaustive opinions by Judge Reeves on this matter of jurisdiction of the Emergency Court of Appeals (Rec. 37; Rec. 45; 82 Fed. Supp. 455). Judge Reeves' first opinion overruling defendant Recon-

struction Finance Corporation's Motion to Dismiss (Rec. 37) is not published. It, too, clearly demonstrates that the Emergency Price Control Act had nothing to do with the arrangement for strategic and critical materials provided for by a separate and distinct government agency and therefore the Emergency Court of Appeals had no jurisdiction of this cause. They should be persuaded that Respondent is wrong on this point. In any event, this Court should grant certiorari so that this question looming so large and important, in Respondent's consideration, should be laid at rest by this Court.

Further, during the period complained of in this case (1943 to 1947) of over 500 cases decided by the Emergency Court of Appeals (Petition Rehearing, Eighth Circuit, p. 28) it is not denied that that there was not one metals case.

Members of this Court cannot help being impressed by this fact in that it definitely shows the bench and bar gave Respondent's theory no credence in practice. Your esteemed Chief Justice who sat on the Emergency Court of Appeals knows that there was an entirely different administrative program between metals and meat.

In addition, it is apparent from the rules of the Emergency Court of Appeals that the Court had determined its own jurisdiction to be limited to matters involving the Price Administrator, and he alone. For example, Rule 11 of that court provides:

> "(a) Form. The complaint shall contain a caption setting forth the name of the court and title of the case, giving the name of the complaintant, versus the person holding the office of Price Administrator as respondent, *e.g.*:
>
> *John Doe* v. *Leon Henderson, Price Administrator.*"

Other rules, with respect to the filing of briefs, etc., all contemplate the Price Administrator as the only person concerned other than the complainant. We have no doubt that had we mistakenly attempted to invoke that court's jurisdiction of this matter, counsel would have immediately moved to dismiss on the ground that that court had no jurisdiction and they would have been right, for the very simple reason, to reiterate, that the Price Administrator had absolutely nothing to do with this matter except to vote as a member of the Quota Committee.

Too, we want it understood that the position of Petitioner is unique in comparison with other marginal producers of lead and zinc in that it continually protested against its quotas and also it was advised to await full production before proper payments by Metals Reserve Company could be arrived at. In other words, a decision in this case favorable to your Petitioner does not involve re-opening quotas definitely closed by acceptance or lack of protest on the part of other producers. This is made clear by the opinion of the Honorable John C. Collet (R. 18).

Respondent's brief is also self-contradictory in that when it attempts to prove exclusive jurisdiction of the Emergency Court of Appeals, Metals Reserve Company is conceded to be the activating force and responsible entity in the carrying out of the metals program; however, when it argues the contract phase of the case, it immediately changes direction and rush in OPA, WPB, etc., as reinforcements to prove that Metals Reserve Company was only incidentally involved. Metals Reserve Company's legal position in this case, insofar as Respondent is concerned, changes with the phase of the case being argued.

Finally, we submit that any petition for certiorari which requires a brief in opposition consisting of a statement of facts of eighteen pages plus twelve and one-half pages of argument must have some merit. In fact, Respondent's brief is not a brief in opposition—*it is a brief on the merits covering* the entire case. Most of Respondent's statement of facts (first 20 pages out of a total of 33 pages contained in the brief) have but little to do with the situation now before this Court; to-wit, matters of conflict between the Courts of Appeals and second, matters of public importance. Respondent devotes but little attention thereto in its argument and less in its statement. The office of certiorari is only for the purposes defined by Justice Taft and briefs should be confined thereto in concise fashion, and according to Rule 38 of this Court the petition shall contain a "summary and short statement of the matter involved." We have conformed to this rule, but Respondent has failed to do so. In fact, Respondent's statement amounts to a complete argument of the facts in the case from its point of view and does not develop or inform the Court as to Petitioner's side of the case.

For example, Respondent, on pages 10 and 11 of its statement, refers caustically to the loan from Respondent to Petitioner. However, counsel fails to mention this loan was made on blocked out known ore reserves approved by their client's own engineers. In other words, it was like making a loan on wheat in the bin or oil in the barrel. Respondent further fails to mention that this loan was entirely paid off with interest.

Respondent would use the office of certiorari to argue the case on the merits. Respondent's statement would be perfectly in order if this Court should grant certiorari.

A matter involving lack of uniformity of decisions among the circuits; the decisions of one of the circuits

itself, to-wit, the eighth; the conflict between some of said decisions and a decision of this Court; and the unusual number of matters of public importance involved warrant the issuance of certiorari herein, which we pray be granted.

Respectfully submitted,

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement:	2
1. Premium Price Plan	3
2. Petitioner's claim for additional premiums	9
3. Proceedings below	16
Argument	20
Conclusion	33
Appendix	34

CITATIONS

Cases:

Armour & Co. v. *Bowles*, 148 F. 2d 529, certiorari denied, 325 U. S. 871	25
Armour & Co. v. *Reconstruction Finance Corporation*, 162 F. 2d 918	22, 25
Belle City Packing Company v. Reconstruction Finance Corporation, 169 F. 2d 413	22
Ben H. Rosenthal & Co., Inc. v. *Porter*, 158 F. 2d 171, certiorari dismissed on petitioner's motion, 330 U. S. 802	25
Bowles v. *Willingham*, 321 U. S. 503	21
Coffey v. *Smith*, 159 F. 2d 277	21
Cummings v. *Deutsche Bank*, 300 U. S. 115	29
Dodge v. *Board of Education*, 302 U. S. 74	29
Duncan v. *Reconstruction Finance Corporation*, 178 F. 2d 926, certiorari denied, 339 U. S. 947	22
Earl C. Gibbs, Inc. v. *Defense Supplies Corporation*, 155 F. 2d 525, certiorari denied, 329 U. S. 737	16, 25
Fleming v. *Phoenix Chair Co.*, 168 F. 2d 3	21
Frisbie v. *United States*, 157 U. S. 160	29
Greenhouse Bros. & Finkelstein, Inc. v. *Reconstruction Finance Corporation*, 159 F. 2d 712, certiorari denied, 331 U. S. 812	22
Illinois Packing Co. v. *Bowles*, 147 F. 2d 554	22
Illinois Packing Co. v. *Snyder*, 151 F. 2d 337	22, 25
Keifer & Keifer v. *R. F. C.*, 306 U. S. 381	30, 31
Lockerty v. *Phillips*, 319 U. S. 182	21
Maricopa County v. *Valley Bank*, 318 U. S. 357	29
Merchants Packing Company v. *Reconstruction Finance Corporation*, 176 F. 2d 908	22

Cases—Continued

	Page
Noble v. *Ricker*, 165 F. 2d 283	21
Pennie v. *Reis*, 132 U. S. 464	29
Porter v. *Eastern Sugar Associates*, 159 F. 2d 299	21
R.F.C. v. *Childress* (C.A. 8), No. 14,094, December 12, 1950	32
Rubin et al. v. *Bowles*, 150 F. 2d 860	25
Schluderberg-T. J. Kurdle Co. v. *Reconstruction Finance Corporation*, 169 F. 2d 419, certiorari denied, 335 U. S. 846	22, 25
Swift & Co. v. *Reconstruction Finance Corp.*, 183 F. 2d 456, certiorari denied, 340 U. S. 878	21, 22
Tambasco v. *Reconstruction Finance Corporation*, 178 F. 2d 283	22
United States v. *Teller*, 107 U. S. 64	29
Woods v. *Bobbit*, 165 F. 2d 673	21
Yakus v. *United States*, 321 U. S. 414	21

Statutes:

Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765; 58 Stat. 632; 59 Stat. 306; 60 Stat. 664; 50 U. S. C. App. 901 *et seq.*)	4
Section 2(e)	4, 7, 23, 24, 26, 27, 28, 34
Section 201(b)	5
Section 203	18
Section 204(d)	18, 20, 21, 23, 28, 35
Reconstruction Finance Corporation Act of 1932, section 5d, as amended, 15 U. S. C. 606b	18, 23, 24, 26, 27, 28
Stabilization Act of 1942, 50 U. S. C. App. 961	16
59 Stat. 310	6
28 U. S. C. 43(a)	32
28 U. S. C. 451	32
28 U. S. C. 1346(a)(2)	20
28 U. S. C. 2107	32
50 U. S. C. App. 603, 631	18

Miscellaneous:

89 Cong. Rec. 6404	28
95 Cong. Rec. 7039	30
Executive Order 9841, 12 F. R. 2645, par. 302(b)	8, 28
Federal Rules of Civil Procedure, Rule 73(a)	19, 32
H. Doc. 758, 80th Cong., 2d Sess., Report on Audit of Reconstruction Finance Corporation and Affiliated Corporations: Metals Reserve Company, pp. 3, 5-6	32
H. Doc. No. 33, 81st Cong., 1st Sess., pp. 31-32	26
H. R. 5192, 80th Cong., 2d Sess.	30
H. R. 834, 81st Cong., 1st Sess.	30

Miscellaneous—Continued

	Page
H. R. 8883, 81st Cong., 2d Sess.	30
House Rept. 202, 81st Cong., 1st Sess., on H. R. 834, p. 3	30
H. Rept. 2539, 81st Cong., 2d Sess., on H. R. 8883, p. 2	30
Senate Subcommittee Print No. 8, 79th Cong., 2d Sess., Report of the Subcommittee on Mining and Minerals Industry to the Special Committee to Study and Survey Problems of American Small Business	3
Page III	26
Pages 74-79	3
Page 98	6
Pages 148-149	7
Page 223	6
Veto Message on H. R. 834, H. Doc. No. 253, 81st Cong., 1st Sess., p. 3	30

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 481

MACARTHUR MINING COMPANY, INC., PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the United States District Court for the Western District of Missouri (R. 37-42; 45-51; 450-453), are reported at 82 F. Supp. 455 and 87 F. Supp. 211. The opinion of the Court of Appeals for the Eighth Circuit (R. 493-502) is reported at 184 F. 2d 913.

JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1950 (R. 502). A petition

for rehearing was denied on December 5, 1950 (R. 533). The petition for a writ of certiorari was filed on January 3, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the administrative denial of petitioner's claim for additional zinc and lead subsidy payments constituted the issuance of an order under Section 2(e) of the Emergency Price Control Act of 1942, reviewable only in the Emergency Court of Appeals.

2. Only if the preceding question be answered in the negative need the following additional questions be considered:

   a. Whether the Roosevelt-Nelson letters constituted a contractual commitment to petitioner.

   b. Whether this action is, in substance, a suit against the United States to which it has not consented.

3. Whether respondent's appeal to the court below was timely.

STATUTES INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, are set forth in the Appendix, *infra,* pp. 34-36.

STATEMENT

This is a suit to recover subsidy payments under the Premium Price Plan which were allegedly

withheld from petitioner by the "unwarranted and capricious" action of those administering the Plan (R. 3). The facts, as they appear in the transcript and the official records of the emergency subsidy program, are as follows:

1. *Premium Price Plan.*[1] The Plan had its origins in the efforts of the Government, early in the defense program prior to World War II, to expand production of copper, lead, and zinc and to maintain price stability in these strategic materials. The problem faced by the Government was that of encouraging production without greatly increasing the general level of metal prices.

Following the outbreak of war in Europe, American metal markets were generally unstable, with sharply fluctuating prices. In 1940 and 1941, efforts were made to achieve price stability by stabilization agreements with the leading zinc, lead and copper operators, and subsequently, maximum price schedules.[2] Price stability, by these means, was soon jeopardized. Intensive production resulted in rapidly increasing costs because of the use of lower grade ores and more costly mining methods. The absence of wage controls resulted in labor cost increases which imposed

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[1] The description of the Premium Price Plan which follows is derived, except where otherwise noted by references to the transcript, from Senate Subcommittee Print No. 8, 79th Cong., 2d Sess., Report of the Subcommittee on Mining and Minerals Industry to the Special Committee to Study and Survey Problems of American Small Business.

[2] See Senate Subcommittte Print No. 8, *supra*, pp. 74-79.

additional pressure on the price ceilings. Accordingly, measures were proposed by the various Government agencies concerned to minimize the impact of these cost increases upon the price level but at the same time stimulate the production of low-grade ores, the operation of submarginal properties and the development of additional ore reserves. The Emergency Price Control Act, which, in Section 2(e) (*infra*, p. 34) authorized subsidy payments to domestic producers so as to obtain maximum necessary production, became law on January 30, 1942. 56 Stat. 23. In February 1942, as a result of conferences between the Office of Price Administration, the Office of Production Management, the Metals Reserve Company, and the Reconstruction Finance Corporation, the Premium Price Plan was finally evolved.

The basic principle of the Plan was the payment by Metals Reserve Company (MRC) of supplemental subsidies or premiums above the ceiling prices for copper, lead, and zinc produced in excess of specified production quotas. Although it was originally planned that MRC would purchase such premium metal and dispose of it at ceiling prices, the Plan as put into operation took the form of a subsidy payment to the operator, representing the difference between the ceiling price and the premium price, with the metal itself going through the normal trade channels. (R. 168-169.)

As initiated, the Plan provided for the assignment of quotas to each mine based on the 1941

production of the mine under consideration. The quota was to represent the maximum production that might reasonably have been expected during 1941 with existing facilities and labor, had these been used to full capacity. Zero quotas were assigned to mines which produced 200 tons or less during 1941, intermediate quotas between zero and 100 percent were assigned to mines which produced more than 200 but less than 600 tons in 1941, and 100 percent quotas were assigned, with certain exceptions, to mines which produced 600 tons or more in 1941. Production in excess of these quotas would entitle the operator to premium subsidy payments from MRC.[3]

With the approval of the President, who was authorized under Section 201(b) of the Price Control Act (50 U.S.C. App. 921(b)) to transfer functions thereunder to various agencies, the administration of the plan was delegated by the Federal Loan Administrator to the War Produc-

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[3] In late 1942, the Plan was modified to provide for greater premium payments to certain high-cost mines. Under this modification, the basic quotas were supplemented by additional quotas. Thus, a mine with a basic quota of 2,000 tons of zinc a year might be assigned a second quota of 3,000 tons ("B" quota) and a third quota of 5,000 tons ("C" quota). The position of such a mine if it produced a total of 6,000 tons would be as follows (R. 168):

1. First 2,000 tons paid for at 8.25¢ per pound by smelter, no premium.
2. Next 1,000 tons paid for at 8.25¢ per pound by smelter, plus premium of 2.75¢.
3. Next 2,000 tons paid for at 8.25¢ per pound by smelter, plus premium of 5.50¢.
4. Next 1,000 tons paid for at 8.25¢ per pound by smelter, plus premium of 8.25¢.

tion Board (WPB), the Office of Price Administration (OPA), and MRC.[4] Quotas were set, upon recommendation of a Quota Committee composed of representatives of OPA and WPB, by the approval of Reviewing Officers of OPA, WPB, and MRC. The "* * * principal function [of MRC] under the plan was to make the subsidy disbursements." (R. 167).[5] Quotas were based in part upon the operator's cost and production estimates, which were studied by the Quota Committee, the Reviewing Officers, and their staffs, and fitted, by the exercise of appropriate judgment, into the standards of the Plan.[6]

As administered, the Plan was in no sense a cost-plus-percentage-of-cost or cost-plus-fixed-fee plan. Quotas were calculated and fixed upon a forecast basis so as to cover anticipated costs and a reasonable profit margin. Whether a particular operator received the calculated margin of profit, exceeded that margin, recovered less than the margin, or even sustained a loss, depended upon the relationship of the actual tonnage produced by the operator and the costs of production to the estimated tonnage and costs. (R. 260-262, 270-274, 283-296.) Generally, operation under the Plan

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[4] Senate Subcommittee Print No. 8, *supra*, p. 223.

[5] On June 30, 1945, the functions and liabilities of MRC were transferred to respondent. 59 Stat. 310.

[6] The process by which quotas were fixed is graphically illustrated by a "flow sheet" which appears at p. 98 of Senate Subcommittee Print No. 8, *supra*.

did not result in the realization of the exact margin used in the calculation of the quota. In some cases, the operator earned a larger return than was intended; in others, his margin was less; and in still others, he sustained a loss. (R. 261.)

Where the return under a quota was much above what the Quota Committee considered adequate, quotas were adjusted to lower the subsidy paid. If the quota yielded an inadequate margin of profit, the Committee, on application of the operator, revised the quota downward so as to yield a higher margin. In both cases, the adjustment was prospective only and made no allowances for the recoupment of excessive profits or the reimbursement of past losses. (R. 261, 274-275.)[7] Quotas were subject to revision retroactively only to correct arithmetical errors of the Committee or to take into account wage increases approved by the War Labor Board (R. 15-16).

This Plan continued in effect from February 1, 1942 to July 31, 1945. By amendments to Section 2(e) of the Emergency Price Control Act, Congress further extended the operation of the Plan to June 30, 1947 (59 Stat. 260, 261; 60 Stat. 664, 671). At that time, the WPB and OPA "functions with respect to premium payments under Section 2(e) (a) (2) of the Emergency Price Control Act of 1942, as amended, insofar as such payments relate to copper, lead, and zinc ores," were vested

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[7] See Senate Subcommittee Print No. 8, *supra*, pp. 148-149.

in the Secretary of Commerce. Executive Order 9841, 12 F.R. 2645, par. 302(b).

On April 17, 1943, while the Plan was operating as described above, Donald M. Nelson, Chairman of WPB, wrote to the President describing national policies as to the production of critical metals and minerals. (R. 6-13). In pertinent part, the letter advised the President that (R. 9-10):

> 5. It is national policy that labor materials, transportation, and time to get into production, rather than money cost, are to be considered the controlling factors in deciding whether or not to increase production, but that the price paid shall bear a reasonable relation to the costs of production and the earning of a fair return over the costs of each separate producer.
>
> Comment.—In any particular project output of product per unit of labor, expenditure of materials and equipment per unit of output, availability and reliability of transportation, time required to secure a usable product are all factors of more importance than money cost. To some extent of course, money cost is a shorthand way of expressing manpower and materials requirements, but we should always look primarily at these factors directly; that is, manpower and material requirements.
>
> By using the phrase 'money cost' I am seeking to emphasize the fact that in this war money must be regarded as a means to an

> end, and not as a measure of the value of that end. The ends we have in mind—complete and speedy victory—are to be measured only in terms of the lives of our fighting men and the security of the Nation.
>
> But I also must make clear that so far as price to any particular producer is concerned, it is a governing principle that the price paid bears a reasonable relation to the costs of production and the earning of a fair return over the costs of each separate producer.

This statement of policy was approved by the President and made public by him in a letter to Senator James E. Murray, dated April 24, 1943 (R. 13).[8]

2. *Petitioner's Claim for Additional Premiums.* Petitioner is a Kansas corporation which, from 1942 to June 30, 1947,[9] engaged in zinc and lead mining operations in Missouri, within the Tri-State Mining Area (R 1, 30, 117). These operations were of a submarginal type made possible by the subsidies payable to petitioner under the

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[8] The full text of the President's letter reads as follows (R. 13):

> This is in further reply to your letter of February 19, raising questions concerning our national policy with respect to the production of strategic and critical metals and minerals. Mr. Donald M. Nelson, Chairman of the War Production Board, has submitted the policies set forth in the letter attached with the recommendation that I approve them and make them public. I do approve these policies, and I am making them public in this letter to you.

[9] Petitioner continued mining after June 30, 1947, the terminal date of the Premium Price Plan. (*Supra*, p. 7.)

Premium Price Plan. Petitioner's initial capital was the lease of the mining property, which required no capital outlay on its part but for which petitioner agreed to pay a royalty out of income. (R. 115-116.) The stockholders and officers of petitioner made no capital contribution or investment whatsoever in petitioner (R. 116-117). Mining operations were begun with loans totalling $125,000, received in 1942 from respondent, which loans were not a part of, or made under, the Plan (R. 120, 282). Additional costs were paid out of income (R. 74).

During the years 1943 and 1944, the period for which additional subsidies are here asked, petitioner's profits, as shown in its profit and loss statements, were as follows: In 1943, when petitioner was still in the initial phases of its operations, it had a net operating profit of $32,496.71, but a net loss of $24,730.71 after deducting for depreciation and depletion (Pet. Ex. 5, R. 331); in 1944, petitioner had a net operating profit of $79,868.66, which, after setting aside reserves for depreciation and depletion, left a net profit of $31,732.80 (Pet. Ex. 6, R. 361). The testimony of petitioner's accountant, however, was that petitioner's total loss for 1943 and 1944 was $42,933.19 or "a little over 19¢ per rock ton" (R. 69). The district court found that in these two years, petitioner had a loss of $17,845.52 and was entitled to a "reasonable" net profit of $278,836.25. The total judgment awarded was $296,681.77 (R.

454).[10] Presumably this computation was based on the premise that petitioner's entire borrowed capital should be fully amortized in these two years of operation,[11] and that reserves for depreciation and depletion should be set up before the computation of profit and loss (R. 70, 74) although the lease had cost petitioner nothing and royalty payments on the lease were deducted from gross income in arriving at net operating profit (R. 331, 361).

For the entire period of petitioner's participation in the Plan from 1943 to June 30, 1947, petitioner had an operating profit before depreciation, depletion and Federal taxes, of $387,000 (R.

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[10] Petitioner states that respondent does not "* * * challenge the fact that MacArthur Mining Company not only did not receive a fair margin of profit but in fact lost 19¢ per rock ton mined * * *" (Pet. 8). In fact, respondent's answer denies petitioner's allegation of a loss of 19¢ per rock ton (R. 23, 32), and respondent contested the validity of this allegation during the trial. Further, respondent urged on appeal below that the court's finding as to the loss sustained was clearly erroneous. Moreover, the record shows that, on cross examination, petitioner's accountant and witness testified to a revised loss computation for 1943 and 1944, based on the assumption that petitioner's entire capital investment should first be amortized and allowances made for depreciation and depletion but with an arbitrary salvage value of 20% for petitioner's equipment. The loss as thus recomputed upon an *ad hoc* basis was reduced "to around 10 or 11 cents a ton" (R. 123-125), and at the close of the trial, petitioner amended its complaint to allege a net loss, after allowing reasonable salvage value, of 10½ cents (R. 447). The court appears, although it did not explain its computation, to have allowed a salvage value for petitioner's equipment in the course of its computation. (R. 123-125.)

[11] It is pertinent to note in this regard that repayments to respondent on petitioner's loan started in June, 1944 and were completed in June 1946. (R. 71-72.)

277), or a net profit before taxes, according to petitioner's accountant and witness, of at least $266,425, after paying off its entire capital investment and making allowances for depreciation and depletion in addition to management fees and salaries (R. 312).

At various times during petitioner's participation in the Plan, petitioner's president complained to several Government offices about petitioner's quotas under the Plan (R. 118-119, 143, 145, 159, 178-179, 249, 251, 252, 266). Petitioner first sought lower quotas (R. 145, 159), and petitioner's quotas were revised from time to time (R. 205, 207, 211, 215, 219, 221, 223, 237, 241, 243, 245, 247). As early as November 23, 1943, petitioner was advised by the Quota Committee that (R. 225-226) "* * * If you are unable to secure an adequate margin under the above quota, we will not consider it sufficient cause for recommending a lower quota, and we suggest that in that case you consider the advisability of the transfer of your labor to other mines where it might be used more effectively in the production of war materials."

Subsequent to 1944, petitioner developed the theory that it had a contract with respondent's predecessors assuring petitioner against losses, and further assuring petitioner "a fair margin of profit" on its 1943-1944 operations. (R. 1-3, 14-18).[12] This theory was based upon Mr. Nelson's

[12] The record shows no sign of this theory or claim prior to 1945 (R. 137, 138, 143, 145, 147, 149, 151, 152, 153, 154).

letter to the President in April 1943, *supra,* pp. 8-9, the President's letter to Senator Murray, approving the policies suggested in the Nelson letter, *supra,* p. 9, and petitioner's asserted reliance upon these letters.

This theory was communicated to the Honorable John Caskie Collet, then Director of the Office of Economic Stabilization, who, on December 4, 1945, wrote the Quota Committee a letter suggesting that "Mr. Nelson's letter of April 17, 1943 and the President's approval of it constitutes a commitment to MacArthur that quotas and premiums would be established which would result in a fair margin of profit" (R. 14, 17).

In reply, the Quota Committee pointed out that the Premium Price Plan had been in existence since February 1942, and expressed the belief that Mr. Nelson's letter was not intended, and could not be construed, to change the established basis of the Plan to the contractual or cost-plus theory urged by petitioner (R. 259-262). The Committee noted that (R. 260):

> * * * Only one mine operator has ever suggested to the Quota Committee that Mr. Nelson so intended and that his statement had the legal effect of turning the Premium Price Plan into a guaranteed cost plus system for every mine operator. The Premium Price Plan was administered on the same principles both before and after Mr. Nelson's statement.

> This seems clear evidence that Mr. Nelson's statement was an affirmation of the existing operation of the Plan.

Continuing, the Committee further observed (R. 261-262):

> It would seem that if it had been intended that no operation should receive less than costs plus the standard margin, all quotas should have been calculated after the event by accountants rather than before production by mining engineers. To figure all quotas prospectively and then to recalculate only those where the margin earned has been less than intended would be even more unsatisfactory than a straight cost-plus system.

In conclusion, the Committee expressed its willingness to go into the facts and make its files available in this regard to Judge Collet (R. 262). Thereafter Judge Collet requested the Quota Committee to submit in writing such further statements as properly bore upon the case in order that he might determine whether a hearing should be had (R. 263). Judge Collet, however, appears to have left the Office of Economic Stabilization before taking such further action. Petitioner's quotas were thereafter further reviewed by the Quota Committee and by the Director of the Office of Economic Stabilization. On April 10, 1946, the Honorable John W. Snyder, then Director of

the Office of War Mobilization and Reconversion, wrote petitioner that (R. 264-265):

> I have had your case reexamined, and am advised by Mr. Chester Bowles, Director of Office of Economic Stabilization, that on the basis of information available, no retroactive adjustment is warranted in this case. Therefore, unless there is additional data available, they are considering the matter closed.

Mr. Bowles, the new Director of the Office of Economic Stabilization, had advised petitioner on March 28, 1946, that its case had been reexamined "fully and carefully" by the Quota Committee; that the Committee "findings have been exhaustively discussed with members of my staff"; that "On the basis of this review of the facts, I am satisfied that no basis exists for a retroactive revision of the quota to the MacArthur Mining Company, and that no exception should be made in this case to the Quota Committee's well-established rule against retroactive quota revisions"; and that "this Office considers the matter closed." (R. 189).

Petitioner then requested Mr. Bowles to withdraw his letter of March 28, 1946 (R. 266). In reply, Mr. Bowles informed petitioner on April 23, 1946, that he had fully considered Judge Collet's letter; that that letter made no final disposition of the question; that the case had been reexamined and reconsidered on "the facts which Judge Collet requested"; and that "I believe the

Quota Committee's decision to be right."[13] (R. 266-267). After the transfer of the administration of the Premium Price Plan to the Department of Commerce (*supra,* pp. 7-8), petitioner's contentions and quotas were fully analyzed by the Department of Commerce and the previous refusal to allow additional subsidy payments was reaffirmed (R. 177-178).

3. *Proceedings below.*—This suit was filed on January 28, 1948, in the District Court for the Western District of Missouri as a "Petition On Contract" in two counts (R. 1-21).[14] In pertinent part, the complaint alleges that the Nelson-Roosevelt letters constitute a "Presidential Directive" having the "force and effect of law by reason of the War Time Powers granted to the President of the United States by Act of Congress, 50 app. USCA, 601, 631, Section 5d of the Reconstruction Finance Corporation Act of 1932, as amended, 15 U.S.C.A. 606b." (R. 2, 30.)

Further, the complaint alleges that (R. 3):

> * * * relying upon said Directive of the President of the United States, it persistently and continuously, orally and in writing, pro-

[13] The Director of Economic Stabilization, under the Stabilization Act of 1942 (50 U.S.C. App. 961) and related Executive Orders, had overriding policy power over all price and stabilization agencies, which were required to adhere to his directives. *Earl C. Gibbs, Inc.* v. *Defense Supplies Corporation,* 155 F. 2d 525 (E.C.A.), certiorari denied, 329 U. S. 737.

[14] The district court found the evidence on the second count too vague to enable it to adjudicate in favor of petitioner (R. 452). This count was abandoned by petitioner on appeal.

> tested and maintained that the quotas assigned and allowed to Petitioner for the production of its lead and zinc were entirely inadequate to provide for a fair margin of profit to which Petitioner was entitled to as a matter of right and as a matter of law as provided in the Directive of the President * * * that except for the National Policy of the United States as embodied and declared in the Directive of the President (Exhibits A and B), it would have been compelled to cease operations in April, 1943. However, in reliance upon this National Policy which your Petitioner alleged to be a commitment to and a contract with Petitioner that quotas and premiums would be established and paid which would result in a fair margin of profit, Petitioner continued its operations. * * *

Continuing, the complaint alleges (R. 3):

> * * * that the refusal of the Quota Committee to allow reasonable and fair quotas to Petitioner during the period January, 1943 to December, 1944 which would allow a fair margin of profit was not based upon fact but constituted a series of decisions and actions utterly unauthorized by law and inequitable in nature and which were the product of the unwarranted and capricious action of the members of the Committee and in direct violation of the Directive of the President of the United States and the law of the Land.

After asserting that "no appellate procedure was provided for wit' respect to the decisions of

the Quota Committee and that Petitioner was therefore powerless to appeal from the Quota Committee's unlawful, discriminate, capricious and arbitrary action" (R. 4), petitioner demanded judgment in the sum of $165,621.17 (R. 4).

In answer, respondent denied that the Nelson-Roosevelt letters constituted a contract or a basis of contract; that they had the force and effect of law by reason of 50 U.S.C. App. 601, 631, and Section 5d of the Reconstruction Finance Corporation Act of 1932, as amended, (15 U.S.C. 606b); that the Premium Price Plan required the payment to petitioner of a margin of profit, fair or otherwise; and that the actions of the Quota Committee and Reviewing Officers had been arbitrary, capricious, or contrary to law (R. 21-27, 30-34).

By way of further defense, respondent contended that the suit was exclusively within the jurisdiction of the Emergency Court of Appeals under Section 204(d) of the Emergency Price Control Act of 1942, as amended, (50 U.S.C. App. 924(d)); that the complaint failed to state a claim upon which relief could be granted; that the district court lacked jurisdiction because the action was in substance a suit against the United States, which had not waived its immunity from suit or consented to be sued; and that petitioner had not exhausted the administrative remedies prescribed by Section 203 of the Emergency Price Control Act of 1942, as amended, (50 U.S.C. App. 923) (R. 33-34).

On February 11, 1949, after a preliminary hearing on the jurisdictional defenses, the district court refused to dismiss the suit for want of jurisdiction (R. 37-42). The district court later denied respondent's motion for reconsideration and rehearing of the jurisdictional defenses (R. 45-51). After a trial on the merits, the court on November 22, 1949, entered a judgment for petitioner in the sum of $296,681.77, together with costs (R. 455, *supra,* p. 11). The court held " * * * that a contractual arrangement actually existed between the Government, through its corporate arms, and the plaintiff * * * The whole aspect of the case is one showing a contract between the Government and its corporate arms or entities with the plaintiff. * * * The Government (or its corporate arm) is in default because it has not made good its promise to save the plaintiff harmless from loss and to assure it a fair margin of profit" (R. 453).

On January 18, 1950, respondent took an appeal to the court below (R. 456). Petitioner moved to dismiss the appeal on May 3, 1950, as not timely filed within the thirty days required by Rule 73(a) of the Federal Rules of Civil Procedure of parties other than "the United States or an officer or agency thereof," on the ground that respondent is not an agency of the United States within the purview of Rule 73(a). (R. 461-480.) This motion was denied by the court below (R. 491),

renewed by petitioner (R. 491-492), and re-denied by the court of appeals (R. 501-502).

On the significant, jurisdictional phase of the case, the court of appeals ruled that the district "court erred in holding that the Emergency Court of Appeals does not have exclusive jurisdiction of the subject matter of the action" (R. 499). It therefore reversed the judgment of the district court and remanded the case with instructions to dismiss the complaint (R. 502). As an additional ground for denying jurisdiction to the district court, the court of appeals noted that the suit is, in effect, one against the United States to recover more than $10,000, an amount for which the Government has not consented to be sued in the district court (28 U.S.C. 1346(a)(2) (R. 501). As to the merits, the court below pointed out that the Nelson-Roosevelt letters purported only to announce a policy of the Government and were not intended to create private contractual or vested rights (R. 498).

ARGUMENT

The decision of the court below, holding that jurisdiction of this action is in the Emergency Court of Appeals and not in the district court, is, we submit, clearly correct; there is no conflict, and no other ground for review by this Court.

1. Section 204(d) of the Emergency Price Control Act of 1942 (50 U.S.C. App. 924(d), see *infra*, p. 35) vests in the Emergency Court of

Appeals, and in this Court, upon review of the Emergency Court's judgments, "exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 * * * and of any provision of any such regulation, order * * *," and provides that no other court shall have jurisdiction or power "to consider the validity of any such regulation, order * * *." The compelling considerations which motivated that exclusive grant of jurisdiction have been reviewed by this Court, and the constitutionality of the grant affirmed. *Lockerty* v. *Phillips*, 319 U. S. 182; *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503.

The Emergency Court of Appeals has this exclusive original jurisdiction, as the express language of Section 204(d) shows, not only as to regulations of general applicability, but also with respect to "order[s] issued under Section 2" of the Emergency Price Control Act and directed at particular individuals. *Porter* v. *Eastern Sugar Associates*, 159 F. 2d 299, 301-302 (C. A. 4) and cases there cited; *Woods* v. *Bobbit*, 165 F. 2d 673 (C. A. 4); *Coffey* v. *Smith*, 159 F. 2d 277 (C. A. 7); *Fleming* v. *Phoenix Chair Co.*, 168 F. 2d 3 (C. A. 7); *Noble* v. *Ricker*, 165 F. 2d 283 (C. A. 10). No other court "whether federal, state or territorial [has jurisdiction] to pass upon these questions." *Swift & Co.* v. *Reconstruction Finance Corp.*, 183 F. 2d 456, 459 (C. A. 7), certiorari denied, 340 U. S. 878.

There also is no longer any room for doubt that the denial by respondent of a subsidy or premium claim constitutes the issuance of an individual order. All pertinent decisions so hold, stressing the fact that Reconstruction Finance Corporation's administrative action "relative to the payment or non-payment of a subsidy" is "an order" over which the Emergency Court of Appeals has exclusive jurisdiction. *Tambasco* v. *Reconstruction Finance Corporation*, 178 F. 2d 283, 285 (C. A. 2); *Swift & Co.* v. *Reconstruction Finance Corp.*, 183 F. 2d 456 (C. A. 7), certiorari denied, 340 U. S. 878; *Duncan Coffee Co.* v. *Reconstruction Finance Corporation*, 178 F. 2d 926, 928 (E.C.A.), certiorari denied, 339 U. S. 947; *Merchants Packing Company* v. *Reconstruction Finance Corporation*, 176 F. 2d 908 (E.C.A.); *Wm. Schluderberg-T. J. Kurdle Co.* v. *Reconstruction Finance Corporation*, 169 F. 2d 419, 420 (E.C.A.), certiorari denied, 335 U. S. 846; *Belle City Packing Company* v. *Reconstruction Finance Corporation*, 169 F. 2d 413, 414 (E.C.A.); *Armour & Co.* v. *Reconstruction Finance Corporation*, 162 F. 2d 918, 923 (E.C.A.); *Greenhouse Bros. & Finkelstein, Inc.* v. *Reconstruction Finance Corporation*, 159 F. 2d 712 (E.C.A.), certiorari denied, 331 U. S. 812; *Illinois Packing Co.* v. *Snyder*, 151 F. 2d 337 (E.C.A.); *Illinois Packing Co.* v. *Bowles*, 147 F. 2d 554 (E.C.A.).

Petitioner apparently does not challenge the exclusive jurisdiction of the Emergency Court of

Appeals over subsidy and premium orders issued under Section 2(e). Nor does it dispute the fact that respondent's administrative action in denying a subsidy or premium claim ordinarily constitutes the issuance of an individual order. Petitioner does, however, endeavor to avoid the jurisdictional limitation imposed by Section 204(d) by arguing that the Premium Price Plan, under which the subsidy payments on the metals here involved were made, "did not function" under Section 2(e) or any other Section of the Emergency Price Control Act (Pet. 21). Authority for these metal subsidies, petitioner contends, is found exclusively in Section 5(d) of the Reconstruction Finance Corporation Act (Pet. 21).

The short and conclusive answer to this contention is that while Section 5(d) authorized respondent to create subsidiary corporations, nothing in that Section authorized payment of subsidies or premiums to compensate producers for low ceilings on their price-controlled products. Indeed, the only express authority for such payments is that contained in Section 2(e) of the Emergency Price Control Act. The terms of Section 2(e), despite petitioner's intimation to the contrary (Pet. 21), show that that section is the sole basis for subsidy payments whether those payments were made by the Price Administrator, by Metals Reserve Company, or by any other Section 5(d) subsidiary of the Reconstruction Finance Corporation. Section 2(e) of

the Price Control Act establishes the criterion that subsidy payments may be made only when it is determined that in the absence of subsidies the necessary maximum production will not be obtained. Section 2(e) also provides that the amounts of the subsidy and the manner and terms upon which they are paid shall be such as are determined to be necessary to obtain the maximum necessary production. As to materials which are not critical nor strategic, Section 2(e) authorizes the Price Administrator to make both of these determinations as well as the actual subsidy or premium payments. With respect to critical or strategic materials, Section 2(e) provides that the determinations are to be made by the Federal Loan Administrator with the approval of the President. And Section 2(e) further provides that the actual subsidy or premium payments for these critical or strategic materials are to be made by corporations created under Section 5(d) of the Reconstruction Finance Corporation Act. This reference, within Section 2(e), to Section 5(d), in no way transplants the basic authority for the subsidy program from the Price Control Act to the Reconstruction Finance Corporation Act. That authority remains where it originated—in Section 2(e). The reference to Section 5(d) does no more than allow the subsidy payments on strategic or critical materials to be made by corporations created under Section 5(d).

The history and operation of the Premium Price Plan (*supra*, pp. 3-9), showing the close interrelationship between the ceiling prices on zinc and lead and the subsidies payable for their production, confirm the need for holding, as did the court below, that "the quotas issued by the Quota Committee of the Premium Price Plan, assailed in this case, were all issued under the authority of Section 2(e) of the Emergency Price Control Act of 1942 as amended." (R. 499.) As that history shows, the need for governmental subsidies or premiums for metals, as well as for other commodities, in order to supplement ceiling prices and thereby assure adequate wartime production, was felt soon after Pearl Harbor. This necessary relationship between subsidies and ceiling prices has been consistently recognized by the courts. *Armour & Co.* v. *Reconstruction Finance Corp.*, 162 F. 2d 918, 922 (E.C.A.); *Ben H. Rosenthal & Co., Inc.* v. *Porter*, 158 F. 2d 171, 172 (E.C.A.), certiorari dismissed on petitioner's motion, 330 U. S. 802; *Armour & Co.* v. *Bowles*, 148 F. 2d 529, 532, 534 (E.C.A.), certiorari denied, 325 U. S. 871; *Earl C. Gibbs, Inc.* v. *Defense Supplies Corp.*, 155 F. 2d 525, 526 (E.C.A.), certiorari denied, 329 U. S. 737; *Illinois Packing Co.* v. *Snyder*, 151 F. 2d 337, 339 (E.C.A.); *Schluderberg-Kurdle Co.* v. *Reconstruction Finance Corporation*, 169 F. 2d 419, 420 (E.C.A.), certiorari denied, 335 U. S. 846; *Rubin et al.* v. *Bowles*, 150 F. 2d 860, 861 (E.C.A.). While the cited

cases relate to subsidies on meat, there can be no doubt that "the premium price plan for copper, lead and zinc" was similarly "closely tied into the price ceiling mechanism." Senate Subcommittee Print No. 8, 79th Cong., 2d sess., Report of the Subcommittee on Mining and Minerals Industry to the Special Committee to Study and Survey Problems of American Small Business, p. III.

Moreover, throughout the operation of the Plan, it was fully recognized not only by those administering the Plan but by the President and Congress as well, that the subsidy payments on zinc and lead were based on Section 2(e) of the Emergency Price Control Act of 1942 rather than on any other legislation. Thus, in a report to Congress by the General Accounting Office on the Metals Reserve Company, it was emphasized that while the Company was created pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, "the authority of Section 2(e), Title I of the Emergency Price Control Act of 1942" enabled the Company to pay "cash subsidies to the domestic producers of strategic and critical metals and minerals" (R. 161, 163).[15] That report also focused attention on the fact that "the largest single class of expenditure made by Metals Reserve Company was the payment of direct cash subsidies to producers of strategic minerals and

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[15] H. Doc. 758, 80th Cong., 2d sess., Report on Audit of Reconstruction Finance Corporation and Affiliated Corporations: Metals Reserve Company, pp. 3, 5-6.

metals. These payments were made pursuant to the authority contained in the Emergency Price Control Act of 1942 and subsequent legislation" (R. 163). Similarly, the Chairman of the Reconstruction Finance Corporation pointed out that "all of the wartime subsidies paid by the RFC subsidiaries were functioned [sic] pursuant to the authority contained in Section 2(e), Title I of the Emergency Price Control Act of 1942 and subsequent legislation * * *. The metals subsidy in question was carried out pursuant to the foregoing statutory authorization by Metals Reserve Company, and the various subsidies paid by Defense Supplies Corporation, another RFC subsidiary, on meat, flour, butter, etc., were similarly handled. All these subsidies rested on the same legal basis." (R. 172-173.) The Chairman of the Quota Committee which administered the Premium Price Plan also testified that the "statutory basis" for the premium price plan "was Section 2 of the Price Control Act of 1942 as amended" (R. 293, 269). The fact that Section 2(e) of the Price Control Act, rather than Section 5(d) of the Reconstruction Finance Corporation Act, provided the statutory basis for making these metal subsidy or premium payments was reiterated in Congress as early as June, 1943, where Senator Murdock observed that "if subsection (e) of Section 2 should be repealed it would destroy their [i.e., Metals Reserve Company's] subsidy programs as to copper, lead and zinc because those programs

are predicated on that section." 89 Cong. Rec. 6404. And it is significant that in 1945, and again in 1946, Congress, in order to avoid termination of the Premium Price Plan, amended Section 2(e) of the Emergency Price Control Act and not Section 5(d) of the Reconstruction Finance Corporation Act, so as to extend the life of the Plan and the authority to make metal subsidy payments thereunder (59 Stat. 260, 261; 60 Stat. 664, 671; *supra,* p. 7). Finally, the President, in 1947, in transferring to the Department of Commerce certain "functions with respect to premium payments" made it again clear that these subsidy payments were made under the Emergency Price Control Act of 1942, as amended, "insofar as such payments relate to copper, lead, and zinc ores." Executive Order 9841, 12 F. R. 2645, par. 302(b).

These considerations, we submit, demonstrate that the authority for payment of metal subsidies here involved is based only on Section 2(e) of the Emergency Price Control Act. Accordingly, since an order relative to the payment or non-payment of such a subsidy is therefore an order under Section 2(e), the Emergency Court of Appeals alone, under Section 204(d) of the Act (*infra,* p. 35), has jurisdiction to entertain an attack upon it.

2. Since the court below correctly decided that the Emergency Court of Appeals has exclusive jurisdiction over the instant action, there is no

need to reach any of the other contentions raised by petitioner with respect to its claim against the respondent. However, we believe, for the reasons set forth briefly below, that all of those contentions lack merit.

a. Petitioner urges that the general policy declarations set forth in the Roosevelt-Nelson letters (*supra*, pp. 8-9) constituted a contractual commitment guaranteeing subsidies which would permit it to recover a fair margin of profit on its mining. It seems sufficient to point out here that while metal subsidies compensated the mining companies by enabling them to receive a greater price for their metals than that prescribed by the applicable price regulations, claims for subsidy payments, through the long history of subsidy litigation, have never been denominated contract or property rights. Nor would such a holding, we submit, be consistent with this Court's constant rejection of other attempts to fashion contractual rights out of other policy declarations. See *Dodge* v. *Board of Education*, 302 U. S. 74; *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 122-124; *Maricopa County* v. *Valley Bank*, 318 U. S. 357, 362; *United States* v. *Teller*, 107 U. S. 64, 68; *Pennie* v. *Reis*, 132 U. S. 464; *Frisbie* v. *United States*, 157 U. S. 160, 166. As stated by the court below, "a government 'policy' does not give rise to a contract in and of itself. The announced policy does no more than to authorize the appropriate

government agency to enter into a contract consistent with the policy" (R. 499).[16]

b. Petitioner, assuming the existence of a contract, also contends that the statement by the court below to the effect that the action is an unconsented suit against the United States, conflicts with *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. But that case stands for the proposition that a corporate subsidiary of Reconstruction Finance Corporation, like its parent, is subject to suit on an action arising out of a contract, which "in due

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[16] The introduction into Congress of several bills designed to grant relief to mining companies in petitioner's position evidences a realization on the part of the mining industry that no contractual commitments were intended by the governmental policy announcements, and the Congressional reports reflect a similar understanding. H.R. 5192, 80th Cong., 2d Sess.; H.R. 834, 81st Cong., 1st Sess.; H.R. 8883, 81st Cong., 2d Sess. An essential purpose of these bills was to grant relief to claimants "who did not have a contract." 95 Cong. Rec. 7039; see House Report 202, 81st Cong., 1st Sess., on H.R. 834, p. 3; see also Veto Message on H.R. 834, H. Doc. No. 253, 81st Cong., 1st Sess., p. 3. It is also appropriate to note here that none of these bills, introduced at the request of the mining industry, would go so far as to authorize recovery of profits on production as claimed by petitioner in the instant case, but would allow recovery only of actual loss sustained in mining operations. The bills were directed towards allowing relief to "men * * * who * * * lost their life savings" by engaging in mining operations as a result of solicitation by official representatives. 95 Cong. Rec. 7039. In addition, H.R. 8883 would allow relief only where the mining companies expended monies with the knowledge on the part of the Government and where the Government had "not, prior to the time those expenditures were made * * * discourage[d] * * * such claimant to proceed." H. Rept. 2539, 81st Cong., 2d Sess., on H.R. 8883, p. 2. As noted in the statement, petitioner, as early as November 23, 1943, was expressly discouraged from further mining operations if the premiums which were being paid to him were felt by him to be insufficient. See *supra*, p. 12.

exercise of its powers, [it had] entered into." 306 U. S. 381, 387. Here, however, if any contract was created, we think it clear that such contract was with the Government and not with respondent's predecessor and subsidiary, Metals Reserve Company. The alleged contract was made by the President, on behalf of the United States, and not by Metals Reserve Company,[17] which was merely a fiscal agent for the payment of monies as directed by those charged with the administration of the Premium Price Plan. The history of the Premium Price Plan and petitioner's claim for additional premiums reveals plainly that the subject matter of this suit is not simply a claim against MRC for failure to make payments which were owing petitioner but a claim that the Government, acting through its various agencies, breached its contract by "capriciously and arbitrarily" refusing to fix quotas which would ensure petitioner subsidies large enough to net it a fair margin of profit. Thus, the breach of contract, if any, was committed not by MRC alone but also by OPA, WPB, the Director of Economic Stabilization, the Director of the Office of War Mobilization and Reconversion, the Federal Loan Administrator, and the Department of Commerce (see *supra*, pp. 5-8; 13-16). In the cir-

[17] It is significant in this connection that petitioner, in urging that a contract exists, formulates the issue as follows (Pet. 16): "Did the President of the United States under Congressional War Power Acts have the right to make a binding and legal offer to an industry for the production of critical metals?"

cumstances, the suit is against the United States and not against respondent or any of its subsidiaries. Accordingly, the *Keifer* case, as stated by the court below, is not "in point" (R. 501).[18]

3. Petitioner further urges that the court below thrice erred in denying, as "without merit" (R. 502), petitioner's motion to dismiss the appeal as not timely taken by respondent under Rule 73(a) of the Federal Rules of Civil Procedure.[19] We submit that petitioner's argument on this score is also without substance. Sections 451 and 2107 of Title 28, United States Code, which became effective subsequent to the promulgation of Rule 73(a),[20] clearly and imperatively extend to respondent the sixty day period for filing a notice of appeal. 28 U. S. C. 2107 provides that "in any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry," and 28 U. S. C. 451 defines an "agency" as "* * * any corporation in

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[18] Similarly, the decision below does not conflict with the later opinion of the court below in *R. F. C.* v. *Childress*, No. 14,094, Dec. 12, 1950 (Pet. 14-15), which was simply a suit *by* R. F. C., not against R. F. C., to reform an indenture because of the clerical mistake of one of R. F. C.'s employees.

[19] After its motion had twice been denied (*supra*, pp. 19-20), petitioner again renewed the motion on petition for rehearing (R. 503).

[20] Rule 73(a) was amended subsequent to the revision of Title 28, United States Code, solely for the purpose of deleting the word "circuit" from the phrase "circuit court of appeals." See H. Doc. No. 33, 81st Cong., 1st Sess., pp. 31-32. Cf. 28 U. S. C. 43(a).

which the United States has a proprietary interest * * *." (See R. 481-486).

CONCLUSION

The decision below is correct and there exists no conflict. It is respectfully submitted, therefore, that the petition for certiorari should be denied.

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APPENDIX

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765; 58 Stat. 632; 59 Stat. 306; 60 Stat. 664; 50 U. S. C. App. 901 *et seq.*) provide as follows:

1. Sec. 2(e); 50 U. S. C. App. 902(e):

Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided,* That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought

or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d * * *.

2. Sec. 204(d); 50 U. S. C. App. 924(d):

Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, Title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of